

“THREE STRIKES” SENTENCING: ANOTHER BLOW FOR MĀORI

BY WAYNE RUMBLES

On June 1, 2010 the Sentencing and Parole Reform Act 2010 amended the Sentencing Act and introduced into New Zealand the so-called “three strikes” sentencing regime.¹

The rationale for introducing this sentencing regime was that it would protect the public, deter offenders, and improve public confidence in the criminal justice system.² The stated purpose of the Act is:³

- To deny parole to certain repeat offender and to offenders guilty of the worst murders.
- Impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences.

This legislative comment will argue that this regime will disproportionately impact on Māori who are already over represented in the criminal justice system at every level. The Department of Corrections has reaffirmed that amplification of Māori within the system is at least in part due to systemic factors that operate at one or more steps of the criminal justice process which make it more likely for Māori to be apprehended, arrested, charged, convicted or imprisoned, with the result that Māori “accumulate” in the system in greater numbers.⁴ Given that there is some systematic bias discernable around Māori in the criminal justice system, any habitual offender-sentencing regime will disproportionately impact on Māori, feeding a cycle of increasing Māori incarceration. This comment argues that application of this amendment without first addressing the systematic bias toward Māori in the criminal justice system is unjust. Brookbanks and Ekins have produced a thorough and excellent critique of the “three strikes” regime which details strong arguments as to why the law is unjust, while I fully support the findings of their article, I am not going to repeat their critique, but rather add another possible reason why the “three strikes” regime is unjust and should be repealed or amended as Brookbanks and Ekins suggest.⁵

* Senior Lecturer, Te Piringa – Faculty of Law, University of Waikato. I would like to thank Gay Morgan for her critical thinking and helpful comments.

1 For a discussion of the introduction of the Sentencing and Parole Reform Act see Waren Brookbanks and Richard Ekins “The Case Against the “Three Strikes” Sentencing Regime” (2010) 4 NZ Law Review 689 at 690.

2 Law and Order Committee, Full Report “Sentencing and Parole Reform Bill” (26 March 2010), 1; see also J Collins, “National and ACT agree to three-strikes regime” 19 January 2010 <www.beehive.govt.nz/release/national-and-act-agree-three-strikes-regime>; Rodney Hide and David Garrett, “Three Strikes Policy. The Sentencing and Parole Reform Bill,” (Auckland: ACT Party, 2010) <www.act.org.nz/files/features/three-strikes.pdf>.

3 Section 3 of the Sentencing and Parole Reform Act 2010.

4 See Department of Corrections “Over-representation of Māori in the Criminal Justice System :An exploratory report, (Policy, Strategy and Research Group Department of Corrections September 2007) especially Part 2 “Criminal Justice Bias and Accumulation.”

5 See generally Brookbanks and Ekins, above n 1.

I. THE THREE STRIKES LEGISLATION

In the 2008 National-Act Confidence and Supply Agreement, the National Government agreed to support the introduction of the Sentencing and Parole Reform Bill.⁶ This Bill proceeded through the house and was duly enacted as the Sentencing and Parole Reform Act 2010. It inserts sections 86A-86I into the Sentencing Act 2002.⁷ These reformed sections apply to 40 offences, which are considered to be serious violent offences,⁸ with special provisions for murder and manslaughter.⁹ The trigger for application of the “three strike” regime is a conviction of a qualifying offence, regardless of seriousness or level of sentence.¹⁰

A. *Strike One*

When a defendant is convicted of a qualifying offence for the first time, the Court must warn the offender of the consequences of the offender being convicted of any further qualifying offences.¹¹ This section of the “three strike” sentencing regime contains no particular sentencing directives, so normal sentencing consideration would apply.

B. *Strike Two*

If an offender goes on to commit another qualifying offence after receiving a first warning, the Judge must issue a final a warning which includes the consequences that will follow if the offender is convicted of any further qualifying offences.¹² In addition to this warning any custodial sentence imposed for the second strike offence must be served in full, without parole. The sentencing Judge has no discretion in terms of non-parole.¹³

C. *Strike Three*

If offender is convicted of a qualifying offence committed after the second and final warning, having thus committed three qualifying offences they must then be sentenced in the High Court. The sentencing Judge must sentence the offender to the maximum term of imprisonment specified for the offence, and has no discretion in that regard.¹⁴ In addition to imposing the maximum sentence being prescribed, the Court must also order that the offence is served without parole.¹⁵ In this regard, the sentencing Judge does have discretion. The sentencing Judge is not required to order the

6 “National-Act Confidence and Supply Agreement” (16 November 2008) <www.act.org.nz/files/agreement.pdf>.

7 Sentencing and Parole Reform Act 2010, s 6.

8 Sentencing Act 2002, s 86A includes: robbery, aggravated burglary, assault with intent to rob, wounding with intent to cause grievous bodily harm, wounding with intent to injure murder, manslaughter, rape, indecent assault.

9 Sentencing Act 2002, s 86E.

10 Some of the offences listed under s 86A can range from relatively minor that may normally attract a custodial sentence to the serious violent offences. Under normal sentencing this range can be accommodated by the discretion of the sentencing Judge.

11 Sentencing Act 2002, s 86B, the Court must also give a written warning, the offender must be over 18 years of age and the offence must have been committed after the legislation came into force. See s 12 of the Sentencing and Parole Reform Act 2010.

12 Sentencing Act 2002, s 86C(1).

13 Sentencing Act 2002, s 86C(4).

14 Or each offence if there is more than one. Sentencing Act 2002, s 86D(2).

15 Sentencing Act 2002, s 86D(3).

sentence be served without parole if satisfied that ‘it would be manifestly unjust to make [such an] order’.¹⁶

Although “manifestly unjust” is not defined in the Sentencing Act, it has been interpreted to be a high threshold elsewhere in our sentencing law.¹⁷

There are special provisions that apply if manslaughter is the third strike conviction. In this the case, the Court must impose a life sentence, however it is not required to order the life sentence to be served without parole. The Act requires a minimum non-parole period of imprisonment of 20 year unless the Court considers 20 years imprisonment to be ‘manifestly unjust’. If that is found to be the case, the Court must set a 10 minimum non-parole period.¹⁸

In the case of murder at the second or third strike stage, the Court must sentence the offender to life imprisonment without parole, again, unless the Court is satisfied that it would be ‘manifestly unjust’ to do so. If the Court does deem that life imprisonment without parole would be ‘manifestly unjust’, then whether the murder conviction has come as a second or a third strike becomes relevant.

In a second strike murder conviction, the Court can apply the normal murder sentencing; either a minimum 10 years non-parole period¹⁹ or, if certain aggravating factors were present, a 17 years non-parole period.²⁰ In the case of a strike three murder, if life imprisonment without parole has been deemed ‘manifestly unjust’, the Court must then order a 20 year non-parole period unless it deems that that also would be ‘manifestly unjust’. If so, it can then apply either the 10 or the 17 year minimum non-parole periods as explained above.

II. MĀORI ACCUMULATION IN THE CRIMINAL JUSTICE SYSTEM

There have been a number of empirical studies of the experiences of Māori with the colonial criminal justice system. Simone Bull’s study of Māori and crime in New Zealand from 1853-1919 concludes that early Māori offending could be explained by the ongoing process of colonisation and by a need to project an illusion of state control.²¹ She views the early phase (prior to 1911) of Māori offending as primarily cultural conflicts,²² added to over-policing of Māori alcohol consumption to placate Pakeha and specific instances of the criminalization of Māori Independence movements (mid 1860s, 1881 and 1897).²³

16 Sentencing Act 2002, s 86D(3).

17 See s 102 of the Sentencing Act 2002 regarding the presumption in favour of life imprisonment for murder to be rebutted where life imprisonment would be “manifestly unjust.” See *R v Williams & Olsen* [2005] 2 NZLR 506 (CA). The high threshold of the term “manifestly unjust” is also discussed in terms of departure from life imprisonment See *R v Rawiri* (HC, Auckland T 014047, 16 September 2002, Fisher J).

18 Sentencing Act 2002, s 86D(4).

19 Sentencing Act 2002 s 103.

20 Sentencing Act 2002 s 104.

21 Wayne Rumbles “Treaty of Waitangi Settlement Process: New Relationship or New Mask?” in Greg Ratcliffe and Gerry Turcotte *Compr(om)ising Post/colonilaim(s)* (Dangaroo Press, Sydney, 2001) 225 at 225-226.

22 These included a small number of charged for fishing without a licence, breaches of Cemeteries Act and the Tohunga Suppression Act 1907. See Simone Bull “The Land of Murder, Cannibalism and all Kinds of Atrocious Crimes?” *Māori and Crime in New Zealand 1853-1919* (July 2004) 44(4) *The British Journal of Criminology*, 496 at 505.

23 1860s Waikato Wars, Pai Marire and the criminalization of rebellion, 1879-1882 Parihaka, and 1890s Dog tax and 1897 Parihaka revisited. Bull, above n 22, at 506-510.

However between 1906 and 1911, a 130 per cent increase in the number of charges laid against Māori defendants occurred. This can be explained in part as a second wave of Pakeha focus on Māori and alcohol. However much of the rise in Māori prosecutions can also be tied to a prevalent focus on “law and order” after New Zealand’s 1907 attainment of dominion status. New Zealand was a new and geographically isolated dominion with emerging political structures, which were still unstable. Bull argues that policing was necessarily focused towards those who, by class or by race, were perceived as actual or potential threats to the state-centred concepts of order and regularity. Therefore with a view to state control, legislation was used to facilitate the over-policing of Māori. The focus on Māori offending meant that reported offending statistics increased, setting up a cycle of focusing on the “Māori” criminal problem, which increased reporting of Māori crime, thus justifying the need for further official intervention, with the deeper concern being linked to the new dominion’s focus on state control and law and order. This cycle set up a self-fulfilling prophecy, which still is manifest today.²⁴

There are many other contributing factors to this accumulation of Māori in the criminal justice system. The effects of colonisation through cultural marginalisation and the undermining of the existent traditional Māori legal system ought not be underestimated as ongoing contributors to the high numbers of Māori in the criminal justice system.²⁵ Negative socio-economic factors and negative early life experiences have a criminogenic effect on all people. Unfortunately Māori disproportionately find themselves subject to those circumstances.²⁶

A. *The Systemic Biases of the Cycle*

I will now focus on a number of systematic factors at work in the justice system itself which aggravate the historical and socioeconomic/psychological factors just discussed, and which are likely to exacerbate the injustices to Māori, adding injustice inflicted by the likely disproportional application of the “three strikes” regime. This amplification explanation posits that, whatever the real rate of criminal behaviour, any crime committed (or indeed suspected) is subject to systemic processes that make it more likely that Māori will be apprehended, and then will be dealt with more severely. These processes have variously been described as “unintended consequences of discretion”, “unevenness of decision-making”, “bias” and “institutional racism”.²⁷

Each stage of the criminal justice system has significant inbuilt discretion. The Police have significant discretion. That discretion ranges from whether to investigate a particular complaint of criminal offending through from what process to follow for the apprehension of suspects, whether or not an arrest will be made, whether an arrest will proceed to prosecution and, in many cases including, to what charges will be laid.²⁸ After prosecution the Court may or may not convict, and once convicted the sentencing Judge has discretion as to which sentencing options are suitable.

²⁴ Ibid, at 516-17.

²⁵ Khylee Quince “Māori and the Criminal Justice System in New Zealand” in Julia Tolmie and Warren Brookbanks (eds) *The New Zealand Criminal Justice System* (LexisNexis, Auckland, 2007) at 9-13, R Ranganui Walker *Ka Whawhau Tonu Matou* (2nd Ed, Auckland: Penguin Books, 2004).

²⁶ Ministry of Justice “Social Risk Factors for the involvement in Crime” *Strategic Policy Brief* (Ministry of Justice, Wellington March 2009) and Ministry of Justice “Māori at Risk of Crime: Some Factors” *Strategic Policy Brief* (Ministry of Justice, Wellington April 2009).

²⁷ Department of Corrections, above n 4, at 7.

²⁸ Crown Law *Prosecution Guidelines* (Crown Law, Wellington, 1 January 2010).

Although Māori make up approximately 15 per cent of the New Zealand population,²⁹ the crime statistics reflect a disproportionality that cannot easily be explained.

Māori are more likely to be apprehended for a criminal offence and more likely to be prosecuted than non-Māori, and Māori are nine times more likely to be remanded in custody while awaiting trial.³⁰ Māori account for 41 per cent of all accused offenders,³¹ 44 per cent of all convictions, 46 per cent of violent convicted offences, 47 per cent of property convicted offences and 41 per cent of all convicted drug offences. Māori are nearly three times more likely to be convicted of criminal offences than non-Māori,³² receiving 53 per cent of all custodial sentences and 50 per cent of periodic detention – but only 35 per cent of monetary sentences.³³

New Zealand's imprisonment rate is high compared to similar countries with a rate of 199 per 100,000 (as at June 2010).³⁴ England and Wales have a rate of 152/100,000, Australia has a rate of 134/100,000 and Canada a rate of 117/100,000. Countries that have similar rates of imprisonment to New Zealand include Namibia 194/100,000, Costa Rica 198/100,000, Mexico 207/100,000, Uruguay 193/100,000 and Malaysia 192/100,000.³⁵ New Zealand is out ranked in terms of imprisonment rate by the United States of America with the highest prison population rate in the world of 748 per 100,000.³⁶ The United States of America is often criticised as being out on its own imprisonment trajectory of harsh and exclusionary justice.³⁷ However if Māori are considered in isolation from the rest of the New Zealand population, their imprisonment rate is already about 700/100,000 or on a par with the United States' astonishing statistics. If the Sentencing and Parole Reform Act 2010 does increase the accumulation of Māori in the prisons, the rate of Māori imprisonment may well approach that of or even exceed that of the United States.³⁸

This accumulation of Māori in the Criminal Justice system results in Māori making up 51 per cent of the prison population is not new and a body of research has developed particularly since the 1970s in an attempt to explain the disparities.³⁹ There are several ways that apprehension rates

29 National Ethnic Population Projections: 2006 (base)–2026 update (Statistics New Zealand, 2010).

30 Quince, above n 25, at 1-3.

31 "Crime in New Zealand A Statistical Profile: Statistics" Information Briefing for members of Parliament (Parliamentary Library, 2000) at 9.

32 "Gaps between Ethnic Groups: Some Key Statistics" Information Briefing for Members of Parliament (Parliamentary Library, 2000).

33 Crime in New Zealand, above n 31, at 9.

34 This is the sixth highest rate of imprisonment in the OECD and the 60th highest rate in the world. Prison facts and statistics – September 2010 (Department of Corrections) <www.corrections.govt.nz/about-us/facts_and_statistics/prisons/march_2012.html>. Note prison statistics change daily but general the imprisonment rate and percentage of Māori inmates remains fairly constant over time.

35 Roy Walmsley "World Prison Population List (8th edition, King's College International Centre for Prison Studies London, 2009).

36 Prison facts and statistics - September 2010 (Department of Corrections) <www.corrections.govt.nz/about-us/facts_and_statistics/prisons/march_2012.html>.

37 See Nicola Lacey, "Criminal Justice and Democratic Systems: Inclusionary and Exclusionary Dynamics in the Institutional Structure of Late Modern Societies" (Center for European Studies Working Paper Series #148, 2007) at 9-11.

38 National Health Committee "Health in Justice: Kia Piki te Ora, Kia Tika! – Improving the health of prisoners and their families and whānau: He whakapiki i te ora o ngā mauhere me ō rātou whānau" (Ministry of Health, Wellington, 2010) at 22.

39 See for example L Duncan "Explanations for Polynesian Crime Rates in Auckland" (October 1971) Recent Law at 283-288; Moana Jackson, *The Māori and the Criminal Justice System: He Whaipāanga Hou – A New Perspective, Part 2* (Department of Justice, Wellington, 1988); Quince, above n 25, and Bull, above n 22.

may be amplified, and while each may only have a small impact on its own, their cumulative and compounding effects significantly contribute to Māori accumulation in the criminal justice system.

A considerable number of arrests do follow from police stopping and questioning citizens in public places. There is evidence that Māori are more susceptible to police stopping and checking.⁴⁰ Police do engage in profiling both explicitly and implicitly (even unconsciously) as an aid to crime prevention. Given New Zealand’s crime statistics and the position of Māori in those statistics, ethnicity appears to be a salient characteristic for police inquiry. This will undoubtedly be reinforced by past experience.⁴¹

Although racial profiling is a controversial subject for law enforcement and has been denied as being attributable to the New Zealand Police environment,⁴² nevertheless, a number of studies in counties with similar disproportionate crime statistics for certain sub-groups ethnic find profiling has been a factor.⁴³ It is likely that some form of racial profiling is impacting on apprehension discretion. Maxwell and Smith’s report on police perceptions of Māori clearly showed some elements of ethnicity based profiling by the New Zealand police.⁴⁴

Wortley and Tanner describe racial profiling existing:⁴⁵

...when the members of certain racial or ethnic groups become subject to greater levels of criminal justice surveillance than others. Racial profiling, therefore, is typically defined as a racial disparity in police stop and search practices...increased police patrols in racial minority neighbourhoods and undercover activities or sting operations which selectively target particular ethnic groups.

Maxwell and Smith illustrated that the many Police officers were more likely to carry out a routine vehicle stop of a known offender if they were Māori, more likely to ask what a Māori person is doing if seen out in the small hours of the morning, and most significantly, much more likely to suspect a Māori of an offence or carry out a vehicular stop if a Māori is driving a “flash” car.⁴⁶ It is clear the ethnicity based profiling does not explain the whole of the extent of apprehension disparity – other possible factors may be the dualistic stereotyping of police about Māori and Māori about police.⁴⁷

Through these stereotypes police are more likely to suspect Māori of offending and Māori are more likely to distrust the police, believing any negative response to be racism. This helps cre-

40 Maxwell and Smith, above n 44, at 15.

41 Department of Corrections, above n 4, at 15.

42 “Police Complaints Authority response to Māori Party complaint about Police use of Tasers” (3 April 2007) 638 NZPD 8574.

43 See for example Candice Batton and Colleen Kadleck “Theoretical and methodological issues in racial profiling Research” (2004) 7(1) *Police Quarterly* at 30-64, Ben Bowling and Coretta Phillips *Racism, Crime and Justice* (London: Longman, 2002), Robin Engel, Jennifer Calnan, and Thomas Bernard “Theory and racial profiling: Shortcomings and future directions in research” (2002) 19 *Justice Quarterly* at 249-273, and Lorie Fridell, Robert Lunney and Drew Diamond “Racially Biased Policing: A Principled Response” (Washington, DC: Police Executive Research Forum, 2002).

44 Gabrielle Maxwell and Catherine Smith, “Police Perceptions of Māori: A Report to the New Zealand Police and the Ministry of Māori Development: Te Puni Kokiri” (Institute of Criminology, Victoria University of Wellington 1998).

45 S Wortley and J Tanner “Inflammatory Rhetoric? Baseless Accusations? A Response to Gabor’s Critique of Racial Profiling Research in Canada” *Canadian Journal of Criminology and Criminal Justice* (2005) at 581-583.

46 Maxwell and Smith, above n 44, at 11-16.

47 See Gabrielle Maxwell “Police and Māori: Perceptions of One Another”. Paper presented at Ngakia Kia Puwai, Auckland, 2005.

ate a self-perpetuating and self-fulfilling cycle, as both groups have negative expectations of the interaction. This means that Police may have a heightened response to any suspicious behaviour of Māori, and Māori, through distrust and the belief that police are biased, may respond uncooperatively, which then in turn is further interpreted as suspicious.⁴⁸ Even the Department of Corrections acknowledges that apprehension rates do not simply reflect actual offending behaviour of persons in the community and acknowledge that some form of bias appears to be occurring.⁴⁹

Following apprehension, a decision must be made to initiate a formal prosecution. As the “three strikes” sentencing regime is triggered by the initial conviction of qualifying offence, which charge is laid is crucial to the application of the regime. This sharply increases the significance of prosecutorial discretion and the risk of arbitrary and selective law enforcement.⁵⁰

While overall apprehended Māori are “moderately” more likely than non-Māori to be prosecuted,⁵¹ the higher apprehension rate means proportionately more Māori will be prosecuted. Māori are more likely to convicted of qualifying offences than non-Māori,⁵² and as only a qualifying conviction (regardless of seriousness) is required, Māori will be more likely to come under the regime. This is supported by a 21-year longitudinal study, which showed apparent bias in arrest and conviction rates for Māori relative to non-Māori with similar backgrounds and offending history.⁵³

The “Three Strikes” sentencing regime will only exacerbate the accumulation process outlined above and will disproportionately increase the number of Māori in our prisons.

III. HABITUAL OFFENDER SENTENCING LEGISLATION IN OTHER JURISDICTIONS

New Zealand is not unique in applying habitual offender sentencing legislation.⁵⁴ The application of those laws and their effect on certain ethnic groups within the society, tend to reinscribe the racial biases within criminal justice systems.

In the 1969 report *Towards Unity: Criminal Justice and Corrections*, The Canadian Law Reform Commission considered their habitual offender legislation. This legislation shared some of the elements of the New Zealand “three strikes” regime, namely that the strikes would only apply only after the offender was 18 years of age or older, and that there was no time restrictions to the qualifying offences.⁵⁵ In other ways it was a much more measured regime. It effectively operated as four strike regime requiring three previous indictable offences for which the offender was li-

48 Department of Corrections, above n 4, at 16.

49 Department of Corrections, above n 4, at 17.

50 Brookbanks and Ekins above n 1, at 714-717.

51 Department of Corrections, above n 4, at 20.

52 Ministry of Justice “Conviction and Sentencing of Offenders in New Zealand 1995-2004” (Ministry of Justice, Wellington, 2006).

53 David Fergusson, John Horwood and Nicola Swain-Campbell “Ethnicity and Criminal Convictions: Results of a 21-year Longitudinal Study” (2003) 36(3) *The Australian and New Zealand Journal of Criminology* 354 at 362-363.

54 Twenty two States of the United States of America have some form of three strikes legislation, Most States of Australia have some form of weaker habitual offender legislation. In Canada, the Habitual Offender Act dealt with multiple offences. The law was repealed after a Law Commission Report of 1969 found it to be erratically applied and that it was often used against non-violent and non-dangerous offenders. More recently there has been discussions as to whether to re-enact some form of habitual offender legislation in Canada.

55 Compare the definition for Stage-1 offence in 86A of the Sentencing Act 2002 and ss 660-667 of The Criminal Code (Canada as at 31 March 1969).

able for five years (or more) imprisonment. This in effect introduces a seriousness threshold to the offences. The Canadian system required application to be made detailing previous conviction and evidence that the accused was “leading a persistently criminal life”.⁵⁶ The applications were considered by a judge alone (without a jury), thus preserving judicial discretion in applying the increased sentencing for habitual offenders.⁵⁷

However the Canadian Law Reform Commission recommended repeal of the habitual offender sections and that they be replaced with what was in effect a preventative detention regime similar to one in the present New Zealand Sentencing Act.⁵⁸ In their justifications for recommending repeal, the Commission noted that the application of the Habitual Offenders sentencing was inconsistent, discriminatory and any deterrent value was slight:⁵⁹

Its discriminatory application against a few offenders, from among the large number of recidivists against whom the legislation might be applied, naturally results in bitterness and feelings of injustice among the ... offenders against whom it has been applied

In studying the cases of offenders incarcerated under the habitual offender regime, the Commission noted that the regime had been primarily invoked for offences against property.⁶⁰ Although the justification of the regime was to protect the public from the most dangerous offenders, in reality many of those incarcerated may have been a social nuisance but did not pose a grave threat to public safety.⁶¹

There are also numerous studies that demonstrate the disproportionate effect of California’s three strike legislation on African Americans and Latinos.⁶² Although the following words are referring to California’s three strike laws they resonate with our own regime in New Zealand.⁶³

The [] inequality is in the race and ethnicity of people subject to the law. In the state as a whole and most localities in particular, minorities are treated more harshly at every stage of the system—beginning at arrest and ending, for some of them, with a sentence under Three Strikes.

56 The Criminal Code (Canada as at 31 March 1969) s 660(2)(a).

57 It should be noted that this regime provided for preventive detention to be applied to habitual criminal offenders in lieu of any other sentence imposed. An application could be applied for up to three months after the sentence had been passed.

58 See *Towards Unity: Criminal Justice and Corrections* (Canadian Law Reform Commission, Ottawa, 1969) at 258-261 which also included the repeal of the dangerous sexual offenders legislation and recommended that both of these be covered by a preventative detention regime (Dangerous Offenders Legislation). Eventual repeal and replacement of the section was not until 1977 but the Dangerous Offender Legislation was based on the 1969 report. See also John Howard Society “Dangerous Offender Legislation around the World” (1999) <www.johnhoward.ab.ca/pub/C20.htm> and Sentencing Act 2002, ss 87-90.

59 *Towards Unity*, *ibid*.

60 *Towards Unity*, *ibid*, at 251.

61 *Ibid*, at 251- 252.

On analysis the Commission came to the following conclusions:

- Almost 40% of those incarcerated under the regime appear not to be a threat to the public
- Perhaps 1/3 would appear to pose a serious threat
- Substantial number where there was not enough evidence to warrant a conclusion that they posed a threat.

62 See for example Elsa Chen “The Liberation Hypothesis and Racial and Ethnic Disparities in the Application of California’s Three Strikes Law” (2008) 6(2) *Journal of Ethnicity in Criminal Justice* at 85 and 87-89; Lawrence Bobo and Victor Thompson “Racialized Mass Incarceration: Poverty, Prejudice, and Punishment” in Hazel Markus and Paula Moya (eds) *Doing Race: 21 Essays for the 21st Century* (Norton New York, 2010) at 322.

63 Scott Ehlers, Vincent Schiraldi, and Eric Lotke “Racial Divide: An Examination of the Impact of California’s Three Strikes Law on African-Americans and Latinos” (Justice Police Institute, Washington, 2004) at 19.

Of course, the racial disparities in the criminal justice system are the result of many causes. Minority communities often experience higher rates of poverty or unemployment; individuals may have less money and more trouble making bail or hiring private attorneys who can advocate on their behalf for better treatment under the law. However, the present system appears to exacerbate rather than ameliorate these underlying inequalities. Attention needs to be paid to ensure that the justice system of California reaches as near as possible to the aspiration of equal justice under law. The Three Strikes law, as it is currently structured, does not appear to be meeting that aspiration.

Māori already feel alienated by a criminal justice system that is perceived as treating them unjustly,⁶⁴ the “three strikes” sentencing regime is just another blow for Maori. Applying habitual offender sentencing legislation to a criminal justice system, which already has systematic bias towards apprehending, prosecuting and convicting one social group within a society cannot lead to greater security for the public. While there are many other reasons why the Sentencing and Parole Reform Act 2010 is bad law⁶⁵ and should be repealed, I argue that the exacerbation of underlying inequalities in the criminal justice system is one of them. The Canadians recognised the injustice of this type of legislation in 1969. My hope is that here in New Zealand we also may see this legislation to be what it is, unjust, arbitrary and disproportionate, and that we will either repeal or extensively amend it.⁶⁶

64 “Perspectives on Responding to the Over-Representation of Māori in the Criminal Justice System. The Views of Māori Stakeholders” (Justice Sector Policy Group, Ministry of Justice and the Social Policy Branch, Te Puni Kōkiri, 1998) at 9-10. A 1998 joint Te Puni Kōkiri and Ministry of Justice study found Māori feel alienated from Police and criminal justice agencies. Responses of the criminal justice system to offending were perceived as unhelpful for Māori offenders in particular. By not effectively dealing with crime, the criminal justice system may actually contribute to re-offending. Some contributing factors noted include:

- the court system is meaningless to many Māori;
- poor quality legal advice to Māori;
- prosecution practices for Māori differ from that of non-Māori;
- culturally inappropriate behaviour of lawyers, court staff, and the judiciary;
- inappropriate sentencing of Māori offenders;
- ineffectiveness of imprisonment.

65 See Brookbanks Ekins, above n 1, generally.

66 Ibid, at 696-699.